IN THE SUPREME COURT OF FLORIDA

CASE NO.: 08-2001

Lower Tribunal No. 3D08-2187

CARLOS DEL VALLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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# BRIEF OF RESPONDENT ON MERITS


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## INTRODUCTION

Petitioner, CARLOS DEL VALLE, was the Defendant in the trial court and the Appellant in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellee in the Third District. The parties shall be referred to as they stand in this Court. In this brief, all references to the opinion under review will be referred to as they exist in the published opinion, *Del Valle v. State*, 994 So.2d 425 (Fla. 3d DCA 2008). The symbol “R” will refer to the record on appeal.

## STATEMENT OF THE CASE AND FACTS

On September 22, 2006, the State filed an information charging Petitioner with one count of possession of cocaine in violation of § 893.13(6)(a), Fla. Stat. in Eleventh Judicial Circuit case number F06-29159. (R. 1 – 3).

On December 1, 2006, the State filed an information charging Petitioner with one count of third degree grand theft in violation of § 812.014(2)(C)6, Fla. Stat., in Eleventh Judicial Circuit case number F06-37940. (R. 46 – 48).

In case number F06-29159, on December 1, 2006, Petitioner entered a guilty plea and was placed on probation for two years. (R. 14 – 15). As a condition of probation, Petitioner was required to pay $25.00 per month toward the cost of supervision. (R. 15).

In case number F06-37940, on December 1, 2006, Petitioner entered a guilty plea and was placed on probation for two years. (R. 51 – 52). As a condition of probation, Petitioner was required to pay $1,809.00 in restitution. (R. 52).

On February 8, 2008, an affidavit of violation of probation was filed alleging that Petitioner failed to pay the monthly cost of supervision and was $375.00 in arrears and that Petitioner failed to make restitution payments and was $1,040.92 in arrears. (R. 20).

On August 7, 2008, a hearing on the affidavit of violation of probation was held. (R. 68). The State called Officer Tyrone Francis, Petitioner's probation officer. (R. 71). Officer Francis testified that he informed the Petitioner of his obligation to pay restitution. *Id*. He informed Petitioner that he was ordered to pay a total of $1,809.99 in payments of $80.00 per month. (R. 73). Officer Francis testified that Petitioner was in arrears in the amount of $1,040.92. (R. 74). The State also called Officer Maria Villadis to testify. (R. 75). Officer Villadis testified that she received a payment of $50.00 from Petitioner towards the outstanding restitution amount. (R. 77). At no time during the hearing did defense counsel move for judgment of acquittal or argue that the State had failed to present evidence or prove ability to pay. (R. 68 – 77).

The trial court ruled:

> The Court finds the state has sustained its burden of proof in proving both affidavits of violation of probation.
>
> …
>
> The Court finds Mr. Del Valle has violated his probation. I modify his probation to include the special condition that he enter into and complete the Miami-Dade County Boot Camp Program, including the after care.

(R. 78).

On August 7, 2008, the trial court entered an order for Petitioner's placement in Miami-Dade county corrections and

rehabilitation department boot camp program. (R. 23 – 26). Petitioner signed a volunteer agreement in which he agreed to participate in the boot camp program. (R. 31 – 32).

The trial court entered an order of modification of probation in which it modified Petitioner's probation as follows:

> 1. Extend probation two (2) years from August 7, 2008
>
> 2. Enter and successfully complete Boot Camp
>
> 3. Cost of supervision waived, including arrearages
>
> 4. Surrender in open court on October 27, 2008
>
> 5. Early termination upon completion of Boot Camp

(R. 37).

Petitioner appealed the trial court's decision. In Petitioner's initial brief, he argued:

> THE TRIAL COURT ERRED IN FINDING THAT MR. DEL VALLE HAD VIOLATED PROBATION BY FAILING TO PAY COST OF SUPERVISION AND RESTITUTION WHERE THERE WAS NO EVIDENCE PRESENTED THAT HE HAD THE ABILITY TO MAKE MORE PAYMENTS THAN HE HAD MADE.

(Petitioner's Initial Brief, i, 4). Petitioner argued: "This Court should recognize that Gonzales is not good law and that the trial court erred in finding that Mr. Del Valle violated probation by failing to make payments when there was no evidence

of his ability to make payments." (Petitioner's Initial Brief, 6). The State responded:

> THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT VIOLATED PROBATION BY FAILING TO PAY THE COSTS OF SUPERVISION AND RESTITUTION WHERE DEFENDANT WAS REQUIRED TO PRESENT EVIDENCE OF HIS INABILITY TO PAY.

(Respondent's Answer Brief, i, 6). The State further argued that Petitioner had not preserved the issue in the trial court because no motion or objection was made. (Respondent's Answer Brief, 6 – 8).

The decision of the Third District read as follows:

> Affirmed. See Gonzales v. State, 909 So.2d 960, 960 (Fla. 3d DCA 2005)("If the probationer's defense is inability to pay, 'it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.' § 948.06(5), Fla. Stat. (2004)").

Petitioner sought discretionary review in this Court, which accepted jurisdiction based on an alleged conflict between district courts of appeal. Petitioner alleged that the Third District's opinion conflicted with other district courts of appeal in that the Third District found that a probationer must prove his inability to pay and other district courts found that the State was required to prove ability to pay prior to revoking probation for failure to pay costs or restitution.

During the pendency of this appeal, Petitioner moved in the trial court for early termination of Petitioner's probation. On March 2, 2009, the trial court terminated Petitioner's probation.

The instant appeal follows.

## SUMMARY OF ARGUMENT

The Third District Court of Appeal did not err in affirming the trial court's decision to revoke Petitioner's probation for his failure to pay costs and restitution. The statute places the burden of proof on the Petitioner to prove inability to pay by clear and convincing evidence. Petitioner failed to prove his inability to pay and failed to comply with the statute. Several other jurisdictions have found that the burden of proving inability to pay properly rests with the probationer. Under these circumstances the Third District Court of Appeal properly affirmed the trial court's decision to revoke Petitioner's probation. In addition, the arguments raised in Petitioner's initial brief were not properly preserved in either the trial court or the Third District Court of Appeal.

## ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO REVOKE PETITIONER'S PROBATION.

The instant case is before this Court based upon a conflict between the opinion of the Third District Court of Appeal and *Blackwelder v. State*, 902 So.2d 905 (Fla. 2d DCA 2005); *Osta v. State*, 880 So.2d 804 (Fla. 5th DCA 2004); and *Shepard v. State*, 939 So.2d 311 (Fla. 4th DCA 2006). The decision of the Third District read as follows:

> Affirmed. See Gonzales v. State, 909 So.2d 960, 960 (Fla. 3d DCA 2005)("If the probationer's defense is inability to pay, 'it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.' § 948.06(5), Fla. Stat. (2004)").

*Del Valle*, 994 So.2d at 425. The Second, Fourth and Fifth Districts ignored the dictate of § 948.06(5), *Fla. Stat.* (hereinafter "The Statute") and held that the State has the burden of proving ability to pay.

The Third District affirmed the revocation of Petitioner's probation on the basis that the Petitioner failed to present any evidence of his inability to pay in accordance with the Statute. The issue before this Court is whether, in a probation revocation proceeding, the State courts can find that a

probationer has the burden of proving inability to pay, pursuant to the statute.

While the loss of liberty necessitated in probation revocation requires that probationers be accorded due process; *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a revocation proceeding is not a criminal trial. *See also, Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)( "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

Florida law is clear that a probation revocation hearing is more informal than a criminal trial, and the burden of proof is less because only the conscience of the court must be satisfied. *Cuciak v. State*, 410 So.2d 916 (Fla. 1982). The ultimate facts necessary to convict a defendant of a criminal offense and those necessary to establish a probation violation are not the same. *Russ v. State*, 313 So.2d 758 (Fla. 1975), *cert. denied*, 423 U.S. 924 (1975). To meet its burden in a violation of probation proceeding, the State need only demonstrate by a preponderance of the evidence that the defendant committed the subject offense. *See, Miller v. State*, 661 So.2d 353, 354 (Fla. 4th DCA 1995). A court at a revocation proceeding must conclude from the weight of the evidence only that a substantial violation of

probation occurred. *Wheeler v. State*, 344 So.2d 630 (Fla. 2d DCA 1977).

There are several differences between a criminal trial and a probation revocation proceeding. As stated above, the burden of proof in a probation revocation proceeding is preponderance of the evidence and in a criminal trial is proof beyond a reasonable doubt. *Miller*, 661 So.2d at 354. In addition, hearsay is admissible in probation revocation proceedings but it is inadmissible in a criminal trial. *Sylvis v. State*, 916 So.2d 915 (Fla. 5th DCA 2005). This Court has held that the right to confront witnesses, prescribed by *Crawford v. Washington,* 541 U.S. 36 (2004), does not apply to probation revocation proceedings. *Peters v. State*, 984 So.2d 1227, 1234 (Fla. 2008) *cert. denied*, 2009 U.S. LEXIS 47 (Jan. 12, 2009). Further, the State has the right to call the Defendant as a witness to testify about non-criminal matters in probation revocation proceeding but does not have this right in a criminal trial. *Perry v. State*, 778 So.2d 1072 (Fla. 5th DCA 2001).

With these differences in mind, the Statute provides:

> In any hearing in which the failure of a probationer or offender in community control to pay restitution or the cost of supervision as provided in s. 948.09, as directed, is established by the state, if the probationer or offender asserts his or her inability to pay restitution or the cost of supervision, it is incumbent upon the probationer or offender to prove by clear

> and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.

(emphasis added). Petitioner argues: "The first half of the statute (the underlined portion) completely ignores *Bearden*'s requirement of a willful violation, and is in direct contravention of *Bearden*'s requirement that there must be evidence and findings of ability to pay before probation can be revoked for the non-payment of financial conditions." (Petitioner's Brief, 21). Contrary to Petitioner's assertion, the statute does not ignore or contravene the requirements of *Bearden v. Georgia*, 461 U.S. 660 (1983).

The issue in *Bearden* was "whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution." *Bearden*, 461 U.S. at 661. The Court noted:

> If the probationer has willfully refused to pay, the State is perfectly justified in using imprisonment as a sanction to enforce

> collection. [citation omitted]. Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense.

*Bearden*, 461 U.S. at 668. The Court held: "that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Id* at 672.

*Bearden* is silent as to whose burden such a showing belongs to, the probationer or the State. The Statute, on the other hand, places the burden on the probationer to provide proof of his inability to pay where the probationer alleges same as a defense. The Legislature contemplated *Bearden* in drafting the Statute. The *Senate Staff Analysis and Economic Impact Statement*, CS/SB 929 (June 11, 1984) noted:

> The bill would track the language of the Supreme Court in Bearden v. Georgia and place the burden on the probationer or offender asserting inability to pay restitution or cost of supervision to prove by clear and convincing evidence that he does not have the present resources available to pay despite sufficient bona fide efforts to acquire legally the resources to do so. This would be after the State first establishes that the probationer or offender has failed to pay restitution as directed by the court.

In *Bearden*, the probationer and his wife both testified "about their lack of income and assets and of his repeated efforts to obtain work." *Bearden,* 461 U.S. at 673. Clearly, in *Bearden*, in stark contrast to the instant case, the probationer undertook the burden of showing his inability to pay. The Statute does not contradict the Supreme Court's holding in *Bearden* and merely addresses the burden of proof, about which *Bearden* was silent.

The Statute is constitutionally sound. It places the initial burden on the state to prove that Defendant failed to comply with the conditions of his or her probation by failing to pay costs or restitution. The burden then shifts to the Defendant to prove inability to pay by clear and convincing evidence. Such burden shifting is permissible under the Constitution. Several other jurisdictions, have held that the burden of proving inability to pay is properly placed on the probationer.

In *State v. Fowlie*, 138 N.H. 234, 237 (N.H. 1994), the New Hampshire Supreme Court stated: "The State's initial burden when, as here, it brings a petition, is to show that the defendant did not meet a condition of his sentence, in this case, the payment of restitution. The court then 'must inquire into the reasons for the failure to pay.' [citation omitted]. If the defendant then 'demonstrates sufficient bona fide efforts to repay his debt', alternatives to imprisonment must be considered

by the court before probation may be revoked and imprisonment ordered." In *State v. Jacobsen*, 746 N.W.2d 405, 408 (N.D. 2008), the North Dakota Supreme Court stated: "Although the State generally has the burden of proving the defendant violated the terms of probation, 'the defendant has the burden to raise and prove an inability to pay restitution at… revocation proceedings triggered by the defendant's failure to pay ordered restitution.'" *In The Matter of J.M., III*, 2003 Tex. App. LEXIS 9083 (Tex. App. 13th Dist. 2003), the Texas Court of Appeals held: "the inability of a juvenile to pay restitution was an affirmative defense to the revocation of probation and the burden of proof was on the juvenile."

In *State v. Bower*, 64 Wn. App. 227, 230 (Wash. App. Div. One 1992), the Washington Court of Appeals explained: "Although the state bears the initial burden of showing noncompliance, this statute requires the offender to 'show cause', that is, to come forward with any affirmative defense he may have in order to demonstrate why he should not be punished…" The Court discussed *Bearden* and stated: "Indeed, although *Bearden* does not explicitly discuss the issue of who bears the burden of proof as to inability to pay, it is clear from the facts of that case that it was Bearden himself who came forward with persuasive evidence that his failure to pay his fine was through no fault of his own." *Id* at 232. In *People v. Thomas*, 194 Cal. Rptr. 252,

257, (Cal. App. 2d Dist. 1983), the California Court of Appeals stated: “A claim of indigency is a special limitation on the court’s power to revoke probation for a violation of a condition. It is therefore like an affirmative defense. The burden of establishing an affirmative defense is typically on the defendant…” The Court further noted: “The probationer is in the better position to show indigency and that best efforts were made to comply with the terms of probation. The probationer has personal knowledge or easy access to the relevant information and the state does not. This is particularly true of financial data. It is both fair and efficient to allocate the burden in this manner.” *Id* at 258.

In *State v. Parsons*, 104 N.M. 123, 128 (N.M. 1986), the New Mexico Court of Appeals held: “In a probation revocation proceeding, if a defendant fails to present evidence of his inability to pay a fine or costs, evidence establishing his non-compliance is sufficient to justify a finding that his failure was willful or without lawful excuse. [citation omitted]. Once the state offers proof of a breach of a material condition of probation, the defendant must come forward with evidence to excuse non-compliance by showing indigency and that the failure to pay was not willful.” In *Stanfield v. State,* 718 S.W.2d 734, 737 (Tex. App. 1986), the Court of Criminal Appeals of Texas held: “[T]he probationer has the burden of producing evidence

and the ultimate burden of persuasion on the issue of inability to pay. No longer then is the State charged with a burden of demonstrating affirmatively that a probationer had the financial ability to make the payment he failed to make." Several other jurisdictions have similar case law.[1]

[1] *See also, State v. Morton*, 1993 Tenn. Crim. App. LEXIS 592, *3 (Tenn. App. 1993)("The trial court made its decision [to revoke probation] on the basis the defendant failed to carry any kind of burden in showing that his indigency prevented him from making payments…"); *State v. Laroche*, 883 A.2d 1151, 1154 (R.I. 2005)("Thus, in probation revocation hearings, this Court has placed the burden on the defendant to explain away any apparent deviation from the terms and conditions of his probation."); *Miller v. Pennsylvania*, 784 A.2d 246, 248 (Commonwealth Court Penn. 2001)("[W]e hold that where a technical violation of parole arises because of a failure to pay for treatment, then the burden is on the parolee to demonstrate his inability to pay."); *State v. Tyson*, 1989 Ohio App. LEXIS 2849, *2 (Ohio App. 8th 1989)("[A] person claiming inability to pay bears 'the burden of going forward with evidence indicating indigency to such an extent that failure to make otherwise required payment must be excused essentially because of practical impossibility.'"); *State v. Jacobsen*, 2008 ND 52, *10 (N.D. 2008)("Although the State generally has the burden of proving the defendant violated the terms of probation, '[t]he defendant has the burden to raise and prove an inability to pay restitution at… revocation proceedings triggered by the defendant's failure to pay ordered restitution.'"); *State v. Jones*, 78 N.C. App. 507, 508 (N.C. App. 1985)("In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to 'offer evidence of his inability to pay money according to the terms of the [probationary judgment.'"); *Turner v. State*, 307 Md. 618, 626 (Md. App. 1986)("[W]e believe that Turner has met his burden to show that the circumstances causing his inability to satisfy the condition of probation were beyond his control. In this instance, it was Turner's indigency which was the cause of his inability to pay."); *State v. Massey*, 782 P.2d 1259 (Kan. App. 1989)("Massey failed to offer any evidence showing a good-faith effort to meet this condition of probation [payment of costs and fees].");

In addition to the case law cited above, several other States have statutes similar to the Florida statute, which places the burden on the probationer to prove inability to pay. § 31-12-3, *N.M. Stat*. provides:

> When a defendant sentenced to pay a fine in installments or ordered to pay fees or costs defaults in payment, the court, upon motion of the prosecutor or upon its own motion, may require the defendant to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that he made a good faith effort to obtain the funds required for the payment. If the defendant's default was contumacious, the court may order him committed until the fine or a specified part of it or the fees or costs are paid.

*Ark. Stat. Ann.* § 41-1103 (Repl. 1977) provides in part:

> (2) Unless the defendant shows that his default was not attributable to a purposeful refusal to obey the sentence of the court, or to a failure on his part to make a good faith effort to obtain the funds required for payment, the court may order the defendant imprisoned in the county jail or other authorized institution designated by

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*People v. Walsh*, 273 Ill. App. 3d 453, 457 (Ill. App. 1st Dist. 1995)("Where defendant makes no effort either to pay restitution or to explain why he is unable to do so, the trial court may revoke probation."); *Monroe v. State*, 2008 Ark. App. LEXIS 681, *3 (Ark. App. Div. 3 2008)("[O]nce the State has introduced evidence of non-payment, the burden of going forward shifts to the defendant to offer some reasonable excuse for non-payment."); *Ramsdell v. State*, 2006 WY 159 *17 (Wyo. 2006)("Once the State demonstrated a failure to pay, the burden shifted to Mr. Ramsdell to establish that he had an inability to pay restitution.")

> the court until the fine or costs or specified part thereof is paid. The period of imprisonment shall not exceed one (1) day for each ten dollars ($ 10.00) of the fine or costs, thirty (30) days if the fine or costs were imposed upon conviction of a misdemeanor, or one (1) year if the fine or costs were imposed upon conviction of a felony, whichever is the shorter period.

*Alaska Stat.* § 12.55.051(a) provides in part:

> If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why the defendant should not be sentenced to imprisonment for nonpayment and, if the payment was made a condition of the defendant's probation, may revoke the probation of the defendant. In a contempt or probation revocation proceeding brought as a result of failure to pay a fine or restitution, it is an affirmative defense that the defendant was unable to pay despite having made continuing good faith efforts to pay the fine or restitution.

*Arizona Stat.* § 13-810(A) provides in part:

> In addition to any other remedy provided by law, including a writ of execution or other civil enforcement, if a defendant who is sentenced to pay a fine, a fee or incarceration costs defaults in the payment of the fine, fee or incarceration costs or of any installment as ordered, the clerk of the court imposing the fine, fee or incarceration costs shall notify the prosecutor and the sentencing court. The court, on motion of the prosecuting attorney or on its own motion, shall require the defendant to show cause why the defendant's default should not be treated as contempt and may issue a summons or a warrant of arrest for the defendant's appearance.

*Hawaii Stat.* § 706-644(1) provides in part:

> When a defendant is sentenced pursuant to section 706-605, granted a conditional discharge pursuant to section 712-1255, or granted a deferred plea pursuant to chapter 853, and the defendant is ordered to pay a fee, fine, or restitution, whether as an independent order, as part of a judgment and sentence, or as a condition of probation or deferred plea, and the defendant defaults in the payment thereof or of any installment, the court, upon the motion of the prosecuting attorney or upon its own motion, may require the defendant to show cause why the defendant's default should not be treated as contumacious and may issue a summons or a warrant of arrest for the defendant's appearance. Unless the defendant shows that the defendant's default was not attributable to an intentional refusal to obey the order of the court, or to a failure on the defendant's part to make a good faith effort to obtain the funds required for the payment, the court shall find that the defendant's default was contumacious and may order the defendant committed until the fee, fine, restitution, or a specified part thereof is paid.

*Nevada Rev. Stat. Ann*. § 176A.430(4) provides in part:

> Failure to comply with the terms of an order for restitution is a violation of a condition of probation or suspension of sentence unless the defendant's failure has been caused by economic hardship resulting in his inability to pay the amount due. The defendant is entitled to a hearing to show the existence of such a hardship.

*New Jersey Stat.* § 2C:46-2(a) provides in part:

> When a defendant sentenced to pay an assessment imposed pursuant to section 2 of P.L. 1979, c. 396 (C. 2C:43-3.1), a penalty imposed pursuant to section 11 of P.L. 2001, c. 81 (C. 2C:43-3.6), a penalty imposed pursuant to section 1 of P.L. 2005, c. 73

> (C. 2C:14-10), monthly probation fee, fine, a penalty imposed pursuant to section 1 of P.L. 1999, c. 295 (C. 2C:43-3.5), other court imposed financial penalties or to make restitution defaults in the payment thereof or of any installment, upon the motion of the person authorized by law to collect the payment, the motion of the prosecutor, the motion of the victim entitled to payment of restitution, the motion of the Victims of Crime Compensation Board, the motion of the State or county Office of Victim and Witness Advocacy or upon its own motion, the court shall recall him, or issue a summons or a warrant of arrest for his appearance. The court shall afford the person notice and an opportunity to be heard on the issue of default. Failure to make any payment when due shall be considered a default. The standard of proof shall be by a preponderance of the evidence, and the burden of establishing good cause for a default shall be on the person who has defaulted.

The plain language of the statute provides that the burden is on the probationer to prove his inability to pay if he wishes to raise same as a defense. *State v. Jett*, 626 So. 2d 691, 693 (Fla. 1993) ("It is a well-established principle of statutory interpretation that an unambiguous statute is not subject to judicial construction, no matter how wise it may seem to alter the plain language of the statute.") In the instant case, the Third District followed the plain language of the Statute. It affirmed Petitioner's revocation of probation on the authority of *Gonzales v. State*, 909 So.2d 960, 960 (Fla. 3d DCA 2005). In *Gonzales*, the Third District stated:

> The trial court found, among other things, that the defendant had failed to pay court ordered restitution and failed to pay court costs. Relying on Edwards v. State, 439 So.2d 1028 (Fla. 3d DCA 1983), the defendant argues that the State must prove the defendant was financially able to make the payments before failure to pay will warrant revoking probation. That part of the Edwards decision is no longer good law. It is now provided by statute that the burden of proof on this issue rests on the defendant. If the probationer's defense is inability to pay, "it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so." [citations omitted].

*Id*. The decision under review and *Gonzales* both follow the letter of the Statute, which as shown above, is clearly constitutional.

In accordance with the Statute, the Third District found that the State had met its burden in proving that Petitioner violated the conditions of his probation by failing to pay restitution and costs. The State presented competent, substantial evidence that Petitioner failed to pay the costs and restitution as ordered by the court. Under the Statute, the burden then shifted to the Petitioner to prove by clear and convincing evidence that he "does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to

do so.” Petitioner failed to meet his burden and the trial court properly revoked his probation on this basis.

The Petitioner relies on numerous cases from the Second, Fourth and Fifth District Court's of Appeal, for the proposition that section 948.06(5) can not apply. Those cases essentially say that 948.06(5) is contrary to the requirement that a violation of probation be willful, and they appear to have their roots in this Court's decision in *Stephens v. State*, 930 So. 2d 1090 (Fla. 1994). *See, e.g., Blackwelder v. State*, 902 So. 2d 905 (Fla. 4th DCA 2005) (citing the need for a willful violation and relying on *Stephens*).

Reliance by decisions of other district courts of appeal on *Stephens* is misguided. *Stephens* did not address the burden of proof regarding ability or inability to pay. The *Stephens* opinion did not even refer to, let alone discuss, s. 948.06(5) or its predecessor, s. 948.06(4). *Stephens* addressed only the need for a "determination" of ability or inability to pay, not who had the burden of going forward with evidence. Indeed, the briefs of the parties, available on this Court’s website, in *Stephens* did not even refer to s. 948.06(5) or its predecessor. It was simply not at issue in *Stephens* and reliance by subsequent district court of appeals decisions on *Stephens* regarding the issue of inability to pay and the burden of proof of inability is therefore clearly misplaced.

Furthermore, the statute, which places the burden of going forward with the evidence of inability to pay on the probationer, is fully consistent with determinations of willfulness when the probationer has not come forward with any such evidence. If the probationer, given the opportunity of presenting such evidence of inability to pay has failed to do so, a court may legitimately conclude, in light of that failure, that the ability to pay exists. It is, in essence, a permissive presumption when the probationer does not come forward with any evidence.

The legislature, by placing the burden of presenting evidence on the probationer has effectively created an affirmative defense. This is something that the legislature clearly has the authority to do. *See*, § 777.201, *Fla. Stat.* requiring defendant in a criminal case to present evidence of entrapment; § 775.027, *Fla. Stat.*, requiring a defendant in a criminal case to present evidence of affirmative defense of insanity by clear and convincing evidence; § 893.101, *Fla. Stat.*, requiring defendant, in criminal case, to present evidence of affirmative defense of lack of knowledge of illicit nature of contraband, where such knowledge was previously deemed an element of an offense; where due process concerns are even greater.

It is well recognized that the legislature is presumed to have enacted valid and constitutional laws, and statutes created by the legislature, whenever reasonably possible, must be construed in a manner to avoid conflict with the Constitution. *See, e.g., State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978). Shifting of a burden of going forward with evidence in a probation proceeding is no more unconstitutional than statutes which create affirmative defenses in criminal cases, where due process rights are even greater. The statute herein does not negate the requirement of *Bearden* or *Stephens* that there be a "finding" regarding inability to pay, and such a finding may be required and made regardless of who has the burden of going forward with the evidence. When a probationer fails to satisfy the burden of going forward with the evidence, a court may clearly conclude that the probationer has the ability to pay, as has been recognized by courts in dozens of states in the aftermath of *Bearden*. Any decision to the contrary would effectively say that the legislature is powerless to create an affirmative defense as to who has the burden of going forward with the evidence. Indeed, it should be noted that in criminal cases, as opposed to probation revocation proceedings, federal courts have found that inability to pay, when relevant to the statutory offense, may be an affirmative defense, even though the government has the burden of proving the commission of the

offense of nonpayment beyond a reasonable doubt. *See, U.S. v. Gardner*, 35 M.J. 300 (C.M.A. 1992); *U.S. v. Austin*, 1993 CMR LEXIS 606 (A.F.C.M.R. 1993).

In the proceedings in this Court, the argument advanced by the Petitioner has altered the claim presented in the district court of appeal below, and has further deviated from the issue addressed in the lower court's opinion. The Petitioner, herein argues: 'THE TRIAL COURT ERRED IN AUTOMATICALLY MODIFYING MR. DEL VALLE'S PROBATION FOR HIS FAILURE TO PAY RESTITUTION AND COSTS OF SUPERVISION ABSENT EVIDENCE AND FINDINGS THAT THE WAS WILLFULLY RESPONSIBLE FOR THE FAILURE TO PAY." (Petitioner's Brief, ii, 12) (emphasis added).

The argument addressed in the district court of appeal, and the argument advanced by the Petitioner in the district court of appeal, was whether Florida, by statute, shifted the burden of going forward with evidence of inability to pay to the probationer. There was no argument by the Petitioner in the district court of appeal to the effect that the trial court was "automatically" modifying probation due to a failure to pay; nor did the district court of appeal's opinion say anything about automatically modifying probation due to a failure to pay restitution. The district court of appeal's opinion held only that the probationer had the burden of going forward with evidence of inability to pay and did not do so. Furthermore, at

no time, in the trial court, did the defense ever argue that modification of probation for failure to pay restitution had in any way been "automatic."

Given that the Petitioner herein has presented an argument which was not advanced in the district court of appeal and was not addressed by the district court of appeal, the presentation of that argument herein is erroneous and is beyond the scope of what this Court should consider herein. *See, Trushin v. State*, 425 So. 2d 1126, 1030 (Fla. 1983) ("Accordingly, since Trushin failed to raise issue 6 before either the trial court or the district court, we decline to address that claim when presented for the first time to this Court.").

Furthermore, there is nothing "automatic" about the modification of probation based on the actions and decisions of the trial court and district court of appeal. Probation was not being modified "automatically" solely because the probationer failed to pay. Rather, it was being modified based upon a combination of (a) the demonstrated failure to pay; and (b) the subsequent failure of the defendant to present any evidence of inability to pay.

Additionally, due to the absence of any trial court motion for judgment of acquittal, or argument by the probationer that the evidence was insufficient regarding failure to pay restitution (or argument regarding the allegedly improper burden

of proof regarding failure to pay), the issue regarding insufficient evidence regarding inability to pay was not properly preserved for appellate review and did not constitute fundamental error. The Petitioner herein could not even raise this issue on direct appeal.

The arguments raised in Petitioner's Brief on the Merits (hereinafter "Petitioner's Brief") were not properly preserved for appellate review. Petitioner argues: "THE TRIAL COURT ERRED IN AUTOMATICALLY MODIFYING MR. DEL VALLE'S PROBATION FOR HIS FAILURE TO PAY RESTITUTION AND COSTS OF SUPERVISION ABSENT EVIDENCE AND FINDINGS THAT HE WAS WILLFULLY RESPONSIBLE FOR THE FAILURE TO PAY." (Petitioner's Brief, ii, 12). Essentially, Petitioner is challenging the sufficiency of the evidence presented to support the modification of probation. The proper method for preserving for review an argument that evidence is insufficient is to make an oral motion for judgment of acquittal at the conclusion of the State's case. To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. *See*, *Archer v. State*, 613 So.2d 446, 448 (Fla. 1993); *Steinhorst v. State,* 412 So.2d 332, 338 (Fla. 1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "fully set forth the grounds on which it is based." *See*, *Fla. R. Crim. Pro.* 3.380(b). In the instant case, defense counsel failed to

move for judgment of acquittal at the close of the State's case and the error complained of in the instant case was not preserved for appellate review, unless it rises to the level of fundamental error.

For an insufficiency of the evidence claim to be considered fundamental error, the evidence must have been insufficient to show that the probation condition was violated at all. This means that the probation violation must be totally unsupported by the evidence. *F.B. v. State*, 852 So.2d 226, 230 (Fla. 2003). In *F.B.*, the Supreme Court cautioned that the fundamental error doctrine should be used very guardedly and stated:

> Rarely will an error be deemed fundamental, and the more general rule requiring a contemporaneous objection to preserve an issue for appellate review will usually apply. We find that the interests of justice are better served by applying this general rule to challenges to the sufficiency of the evidence. Any technical deficiency in proof may be readily addressed by timely objection or motion, thus allowing the State to correct the error, if indeed it is correctable before the trial concludes.

*Id* at 230.

In the instant case, the evidence was not wholly insufficient to establish that Petitioner violated his probation by not paying restitution and the costs of supervision. Officer Francis testified that he informed the Petitioner of his obligation to pay restitution. He informed Petitioner that he

was ordered to pay a total of $1,809.99 in payments of $80.00 per month. (R. 73). Officer Francis testified that Petitioner was in arrears in the amount of $1,040.92. (R. 74). The State also called Officer Maria Villadis to testify. (R. 75). Officer Villadis testified that she received a payment of $50.00 from Petitioner towards the outstanding restitution amount. (R. 77). This is competent substantial evidence that the Petitioner failed to properly make payments, as required by the conditions of his probation. If the defense wished to raise Petitioner's inability or ability to pay, they should have moved for judgment of acquittal or at least made an objection on this basis. This would have given the State the opportunity to re-open its case and present the requested evidence. The failure of the State to present such evidence does not amount to fundamental error and required an appropriate motion by the Petitioner in order to preserve the matter for appeal. *See, e.g., I.M. v. State*, 917 So.2d 927 (Fla. 1st DCA 2005)(Where a juvenile defendant does not object to the amount of restitution on the ground that the record failed to show that he or his parents could reasonably expect to pay the amount of restitution ordered, that argument ordinarily is not preserved for appellate review.).

In *Spivey v. State*, 531 So.2d 965, FN2 (Fla. 1988), this Court noted: "petitioner failed to object and present evidence of his inability to pay the ordered restitution and so has

waived his right to challenge the order on those grounds." In essence, this Court found that it did not constitute fundamental error for the trial court to impose restitution without making a finding of the defendant's ability to pay. While *Spivey* dealt with the imposition of restitution at a sentencing hearing, it would follow that it does not amount to fundamental error where no objection is made at a probation revocation hearing, where the burden of proof is less.

Likewise, Petitioner's argument before this Court was not preserved in the Third District Court of Appeal. Here, Petitioner argues: "[I]n line with the Constitutions of the United States Supreme Court, the decisions of this Court, and the decisions of the Second, Fourth, and Fifth District Courts, this Court should find that Section 948.06(5) is constitutionally infirm…" (Petitioner's Brief, 11). Petitioner did not argue in either the trial court or the Third District Court of Appeal that the Statute was unconstitutional. To the extent that Petitioner is making such an argument, same was not preserved for review by this Court. *See*, *Trushin, supra*; *Richardson v. Richardson*, 766 So.2d 1036,FN4(Fla. 2000)("Appellant did not argue this point to the district court below and, therefore, has not properly preserved the issue for appeal."); *Lawrence v. State*, 831 So.2d 121, 136 (Fla. 2002)(A defendant's issue regarding the constitutionality

of death penalty aggravators was not preserved because the defendant failed to object with specificity in the trial court below.). Since Petitioner failed to object to the constitutionality of the statute in either the trial court or the district court, this argument has not been properly preserved for appellate review.

The State further notes that the Petitioner herein asserts that there were insufficient findings of inability to pay. To the extent that this argument may be distinct from the argument regarding the burden of proof and sufficiency evidence, the State again notes that no such argument was presented in either the trial court or the district court of appeal and again, can not be presented for the first time in either this Court or the district court of appeal. *Trushin, supra*. Given that the defendant, in the trial court, did not undertake to introduce any evidence of inability to pay in accordance with the statutory requirement which itself, is constitutional, any argument regarding insufficient findings would clearly not be fundamental error and could not be raised without preservation. To the further extent that the Petitioner is also claiming that Florida's statute on the burden of proof does not require findings to be made, that argument again was not raised in either the trial or appellate court and is not properly before this Court. Moreover, Florida's statutes does not negate the

need for findings and is thus beyond attack on that count. The statute, at a minimum, implicitly requires findings by the court, as the court is obligated to consider alternative measures if the probationer can not pay. Additionally, as *Bearden* requires findings by the trial court, that requirement is not inconsistent with Florida's statute and would exist independently of the statute.

Thus, the sole issue addressed by the district court of appeal's decision and the briefs of the party below extended to the sufficiency of the evidence regarding ability or inability to pay and the proper burden of proof. All other arguments are beyond the scope of review as they were never presented below.

In addition to being unpreserved, the arguments raised in the initial brief on the merits are moot. During the pendency of this appeal, Petitioner moved in the trial court for early termination of Petitioner’s probation and the trial court terminated Petitioner’s probation. *See*, Motion to Dismiss as Moot.

## CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 29th day of June, 2009 to SHANNON P. McKENNA, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

HEIDI MILAN CABALLERO

**CERTIFICATE REGARDING FONT SIZE AND TYPE**

The foregoing Brief was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

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HEIDI MILAN CABALLERO